No. 02-1209

Supreme Court, U.S.
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In The
Supreme Court of the United States

DAIMLERCHRYSLER SERVICES
NORTH AMERICA LLC,

Petitioner,

v.

MICHAEL F. POWE and
THERESA MOORE BALLARD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The underlying bankruptcy adversary proceeding in this case was filed against Chrysler Financial Corporation, L.L.C. ("Chrysler") on June 24, 1999, and was referred to the bankruptcy court as a core proceeding under the standing Order Of Reference entered by the United States District Court for the Southern District of Alabama.

Chrysler initially filed a motion for withdrawal of the reference to the bankruptcy court, which was denied by the district court by Order dated February 28, 2000.

The adversary proceeding against Chrysler is one of six similar bankruptcy class action adversary proceedings that were filed against various defendant secured lenders at that time in the Southern District of Alabama relating to the assessment and collection of certain postpetition attorneys' fees in Chapter XIII cases. On February 15, 2000, Bankruptcy Judge Margaret Mahoney entered an interlocutory order denying defendant Chrysler's motion to dismiss, as well as the other defendants' motions to dismiss in four of the parallel actions, in an Order Concluding That District Court And Bankruptcy Court Have Subject Matter Jurisdiction And That Matters Are Core Proceedings, reported at 244 B.R. 845 (Bkrtcy. S.D. Ala. 2000) (Chrysler Appendix at 124-149) ("February 15, 2000 Order").

Chrysler filed a motion for leave to appeal the February 15, 2000 Order to the district court, and that motion for leave to appeal was denied by the district court on May 1, 2000. *In re Powe*, 2000 WL 726903 (S.D. Ala. 05/01/2000) (Respondents' Appendix at 1-2). The district court considered both the standards recognized under 28 U.S.C. § 1292(b) and the "more relaxed" standards urged

by Chrysler in denying the motion: "Even under the 'more relaxed' standards of Rule 23(f) and 28 U.S.C. § 158(a) asserted by CFC, however, the Court believes that CFC's request for leave to appeal is inappropriate and due to be denied." (Respondents' Appendix at 2).

On March 27, 2000, Chrysler filed a Motion To Dismiss, Or In The Alternative, Motion For Judgment On The Pleadings and filed an Amendment to that Motion on May 12, 2000. On May 25, 2000, the bankruptcy court entered an Order Denying Motion Of Chrysler Financial Corp. L.L.C. For Judgment On The Pleadings.

The adversary proceeding progressed through discovery to a hearing on Chrysler's Motion For Summary Judgment and the Plaintiffs' Motion For Class Certification on April 5, 2001. On June 1, 2001, Bankruptcy Judge Mahoney entered an Order Denying Debtor's Motion To Strike Chrysler's Amended Motion To Strike, Denying Defendant's Motion For Summary Judgment, And Granting Debtor's Motion For Class Certification ("June 1, 2001 Order"), reported at 281 B.R. 339 (Bkrtcy. S.D. Ala. 2001). The June 1, 2001 Order directed the parties to each submit proposed class definitions by July 1, 2001.

On June 11, 2001, Chrysler filed a motion for leave to appeal the June 1, 2001 Order to the district court. On July 11, 2001, the district court entered an Order denying Chrysler's **second** motion for interlocutory appeal.

> The Court concludes that CFC's motion is due to be denied. The Court specifically agrees that, as was true with respect to CFC's first attempt to appeal, the issues sought to be presented on this appeal do not involve 'a controlling question of law as to which there is **substantial** ground for

> difference of opinion . . . **an immediate [resolution of which] may materially advance the ultimate termination of the litigation**.' 28 U.S.C. § 1292(b). The Court further finds no error sufficient to constitute a finding that Bankruptcy Judge Mahoney has abused her discretion in the matters at hand and cannot conclude that the rulings at issue could escape effective review on appeal after a final judgment.

District Court Order of July 11, 2001 (Chrysler's Appendix at 20) (emphasis by Court in original).

On July 27, 2001, after considering the class definitions proposed by the parties and hearing argument on the issues, Bankruptcy Judge Mahoney entered an Order Defining Class Certified In Case ("July 27, 2001 Class Issues Order"), reported at 280 B.R. 728 (Bkrtcy. S.D. Ala. 2001) (Chrysler's Appendix at 87-90). This order confirmed an initially broad definition for a Rule 23(b)(2) class, with further redefinition to be addressed at trial:

> The definition above closely follows the plaintiff's definition. Chrysler had requested the Court to substantially narrow the definition of class members and create two subclasses. The Court is not narrowing the definition at this point. **If a narrower definition is proved to be appropriate after trial, then the Court will so rule. . . . If trial proof shows that certain states or districts should be excluded from some or all claims, that amendment will be made after trial.**

(Chrysler's Appendix at 88-89) (emphasis added).

On August 6, 2001, Chrysler filed its **third** motion for interlocutory appeal with the district court under 28

U.S.C. § 158(a), seeking to appeal the July 27, 2001 Class Issues Order as well as the June 1, 2001 Order, notwithstanding the fact that interlocutory review of the June 1, 2001 Order was previously denied by the district court on July 11, 2001 and notwithstanding the fact that Chrysler's Motion To Clarify the June 1, 2001 Order was then pending before the bankruptcy court.

Also on August 6, 2001, Chrysler filed a Petition "under Fed. R. Civ. P. 23(f) for leave to appeal" with the Court of Appeals for the Eleventh Circuit, seeking to "challenge both the July 27 Order and the June 1 Order **as well as the district court's orders denying leave to appeal**." Petition (No. 01-90036-D) at 11 (emphasis added).

On August 27, 2001, the district court entered an Order denying Chrysler's **third** motion for interlocutory appeal, the "fourth attempt by [Chrysler] to remove this case from the Bankruptcy Court's jurisdiction."

> The Court concludes that CFC's motion is due to be denied. The Court specifically concludes, as was true with respect to CFC's first attempts to appeal, that the issues sought to be presented on this appeal do not involve 'a controlling question of law as to which there is **substantial** ground for difference of opinion ... **an immediate [resolution of which] may materially advance the ultimate termination of the litigation**.' 28 U.S.C. § 1292(b) (emphasis added [by district court]). The Court once again finds no error sufficient to constitute a finding that Bankruptcy Judge Mahoney has abused her discretion in the matters at hand and cannot conclude that

> the rulings at issue could escape effective review on appeal after a final judgment.

District Court Order of August 27, 2001 (Chrysler's Appendix at 17-18).

On August 31, 2001, Chrysler filed a Supplement to its Petition before the Eleventh Circuit for the stated purpose "to perfect its earlier petition (if it is required to show that it moved for but was denied leave to appeal under 28 U.S.C. § 158(a)) and to serve as a timely petition under Fed. R. Civ. P. 23(f), if such petition lies only from the district court's order denying leave to appeal and not from the bankruptcy court's class certification order." On September 7, 2001, the Clerk of the Court of Appeals advised the parties by letter that "it appears that this court may lack jurisdiction of this appeal" and directed the parties to address the threshold issue of jurisdiction in a written response to be filed by September 21, 2001.

The trial of the adversary proceeding on the merits took place from December 10, 2001 to December 14, 2001. On May 10, 2002, the bankruptcy court entered an Order Granting Judgment To Chrysler Financial Corporation. *In re Powe*, 278 B.R. 539 and 280 B.R. 734 (Bkrtcy S.D. Ala. 2002) (Chrysler's Appendix at 52-86). In that Order, Judge Mahoney concluded that the intervening December 10, 2001, Eleventh Circuit decision in *In re Welzel*, 275 F.3d 1308 (11th Cir. 2001), defeated the claims of the plaintiffs based on inadequacy of the disclosure of attorney's fee, changing the law as Judge Mahoney had understood it at the time of her prior rulings in the case.

> [W]hereas Powe and his counsel might have objected to hourly rates or types of service rendered or time expended when the fee was postpetition

> but not prepetition, that dichotomy has been ruled baseless in *Welzel*. Therefore, if a creditor discloses that an attorneys fee has been charged regardless of whether Chrysler discloses the fee is prepetition or postpetition, that disclosure is sufficient because the review will be the same.

278 B.R. at 539 (Chrysler's Appendix at 79). Judge Mahoney, applying her interpretation of *Welzel*, concluded that the plaintiff class would have claims only where there had been a total failure to disclose the fee, and that the record as she understood it failed to establish any instances of nondisclosure: "There may have been instances where a fee was charged to a debtor and not disclosed. However, the plaintiffs bore the burden of proving that was the case and the Court has no concrete evidence of nondisclosure." *Id.* at 554 (Chrysler's Appendix at 80). To the extent the plaintiffs asserted claims based on the theory that the flat fees charged by Chrysler's attorneys are per se unreasonable, Judge Mahoney concluded that the issue of reasonableness was "personal to each case or district" and could not be dealt with on a nationwide class basis: "Upon hearing the evidence, the Court concludes that there is insufficient commonality to maintain a class except as to debtors in this district," and she concluded that the "fees as charged by [Chrysler] in this district are reasonable." *Id.*

On May 20, 2002, the plaintiffs filed a Motion To Alter Or Amend the bankruptcy court's Order of May 10, 2002. The plaintiffs argued in the Motion that the bankruptcy court had incorrectly applied the *Welzel* decision and had misinterpreted the evidence insofar as the introduction of proofs of claim containing totally undisclosed attorney's fees was concerned. In an Order Granting In Part Plaintiffs'

Motion To Alter Or Amend The Court's Order of May 10 entered July 3, 2002 (Chrysler's Appendix at 43-51), Judge Mahoney rejected the plaintiffs' arguments regarding the interpretation of *Welzel* but agreed that the record supported the conclusion that the plaintiffs had met the burden of establishing the existence of proofs of claim that did not disclose the existence of attorney's fees.

> Plaintiffs' evidence presented at the hearing on the motion to reconsider showed that only proofs of claim which included an attorneys fee were produced by Chrysler. This fact was reiterated several times by the defendant. . . .
>
> . . .
>
> The Court concludes that it erred in placing the burden of proof on plaintiffs as to the issue of whether undisclosed fees were actually included in the proofs of claim produced by Chrysler. Based upon the parties' agreements and oral and written submissions to the Court, plaintiffs had the right to rely on Chrysler's agreement to produce only proofs of claim with fees included. The Court did not understand the production posture at the time of ruling. Therefore, plaintiffs did meet their burden of proof in their case in chief of showing undisclosed fees in proofs of claim. At that point, in Chrysler's case on defense, it had the burden of proving that any proofs produced that on their face disclosed no fee either did not include a fee or the fee was disclosed or approved in another manner.
>
> The Court will set aside the judgment in order to allow testimony and rebuttal on this single issue as soon as possible. The Court is not reopening the case in any other respect. Evidence will be directed at proving that fees were not undisclosed

> or that if undisclosed fees were included in the proofs of claim they were later disclosed, and rebuttal of the same.

(Chrysler's Appendix at 44, 47).

On July 17, 2002, a panel of the Eleventh Circuit heard oral argument limited by it solely to the issue whether any jurisdiction to entertain Chrysler's August 6, 2001 Rule 23(f) Petition (No. 01-90036-D) existed. Even though the bankruptcy court's orders of June 1, 2001 and July 27, 2001 that were the subject of the August 6, 2001 Petition had been superseded by the bankruptcy court's orders of May 10, 2002 and July 3, 2002, Chrysler insisted to the Eleventh Circuit, in a "Second Notice of Recent Developments in Bankruptcy Court" filed July 9, 2002, that "both the underlying case and this appeal [of the superseded 2001 orders] are very much alive."

On July 26, 2002, Chrysler filed with the bankruptcy court a Motion For Reconsideration And Amendment Of The Court's Order of July 3, 2002, ("Chrysler Reconsideration Motion") and a Motion To Determine That Named Plaintiffs Have No Standing To Be Class Representatives And To Dismiss All Further Class Proceedings. ("Chrysler Standing Motion"). The core of the Chrysler Reconsideration Motion was Chrysler's insistence that Chrysler's attorneys had made no agreement as to what type of documents it was producing and that plaintiffs' attorneys had no right to rely on the statements made about what was being produced, conceding only that "some overproduction occurred where Plaintiffs were not notified." Chrysler Reconsideration Motion at 2. Judge Mahoney denied the Chrysler Reconsideration Motion in an August 23, 2002 Order Denying Motion For Reconsideration And

Amendment Of The Court's Order of July 3, 2002 ("Reconsideration Denial Order") (Chrysler's Appendix at 38-42). Judge Mahoney concluded that the evidence adduced by the plaintiffs clearly established the agreement of Chrysler's counsel and the right of plaintiffs' counsel to rely on that agreement:

> The Court stated that CFC and the plaintiffs had an agreement that CFC would produce only proofs of claim that included attorneys fees when it answered plaintiffs' discovery requests. The Court believes, from the evidence provided at the last hearing, that the word 'agreement' correctly describes the parties' postures. CFC's attorneys indicated in all communications with plaintiffs that it was providing only proofs of claim with fees. The plaintiffs agreed to this limitation on disclosure. The plaintiffs' original requests were for broader production. Another word that might describe the situation as well is 'understanding.' The fact is that the plaintiffs had a right to rely on CFC's statements as to what was being produced. There was no convincing contrary evidence produced to show that CFC did not tell plaintiffs that it was producing only claims with fees. Therefore, whether the facts present an 'agreement' or an 'understanding' or a fact pattern in which, even without a formal agreement, plaintiffs had a right to rely on CFC statements, the Court's decision is the same. The word will not be changed in the order.

(Chrysler's Appendix at 39-40). Also on August 23, 2002, Judge Mahoney entered an Order Denying Chrysler's Motion To Determine That Named Plaintiffs Have No Standing To Be Class Representatives And To Dismiss All Further Class Proceedings ("Representative Standing Order") (Chrysler's

Appendix at 29-37). The bankruptcy court's view is that, depending on what the evidence establishes with respect to the single open factual issue of whether a group of proofs of claim produced by Chrysler in fact involved undisclosed fees, viable class claims may or may not still be present:

> Chrysler makes an issue of the fact that the class has been decertified. This was due to the Court's erroneous understanding of the claims produced at trial. The Court concluded that there were no undisclosed fees. As the evidence now stands based upon the Court's reconsideration of its ruling, there **may be** undisclosed fees. **If there are**, those claims are part of the previously certified class. The Court is reconstituting the class in this order.

(Chrysler's Appendix at 35-36) (emphasis added). The Representative Standing Order provides that "the class of plaintiffs previously certified on July 27, 2001 is **reconstituted based on the Court's ruling in its order of July 3, 2002 and this order**." (Chrysler's Appendix at 37) (emphasis added.) It is clear from a reading of the July 3 Order and the Representative Standing Order that should Chrysler prevail on the single open evidentiary issue of whether some of its proof of claims involve undisclosed attorney's fees, the bankruptcy court will re-enter the May 10 Order Granting Judgment To Chrysler Financial Corporation in its entirety.

Rather than expedite discovery and hearing on the single open evidentiary issue, Chrysler elected to file its **Fourth** Motion For Leave To Appeal to the District Court pursuant to 28 U.S.C. § 158(a) with respect to the Reconsideration Denial Order and the Representative Standing

Order, seeking for the **fifth** time to take the case away from the bankruptcy court. At the very same time, it simultaneously filed the Second Chrysler 23(f) Petition (No. 02-90035) with the Eleventh Circuit seeking interlocutory review of the very same Reconsideration Denial Order and the Representative Standing Order.

On September 3, 2002, Chrysler's **Fourth** Motion For Leave To Appeal And Motion For Stay was dealt with by Judge Mahoney in an Order Denying Motion For Leave To Appeal And Motion For Stay ("September 3 Order") (Respondents' Appendix at 3-4). The September 3 Order was a disposition by the bankruptcy court of the Motion for Stay as required under Bankruptcy Rule 8005 and incorporates the bankruptcy court's report and recommendation insofar as the Motion For Leave To Appeal is concerned:

> This Court has concluded that the case needs to be tried and completed. Chrysler asserts that the Court's ruling was incorrect. What Chrysler does not point out is that the case would have been completed and finally decided with all issues taken into account if the Court had been clear about the documents produced by Chrysler that the plaintiff class offered as evidence. If the proofs of claim contain completely undisclosed postpetition attorneys fees, then the class should be awarded injunctive relief. The fees should be expunged from class members accounts and refunds given. If the proofs of claim include fees that were disclosed in the proof or otherwise, then the class will be denied relief. . . .
>
> The trial of this matter will not take much time and the court is prepared to hold the trial as soon as the parties can be ready. There are only a limited

> number of law firms, if any, that may have charged fees that were completely undisclosed.

(Respondents' Appendix at 3-4). On September 26, 2002, the district court entered an Order denying Chrysler's Fourth Motion For Leave To Appeal, in which it noted that by the Motion Chrysler "seeks for the fifth time (the fourth time by appeal) to remove this case from the Bankruptcy Court's jurisdiction."

> The Court specifically concludes, as was true with respect to CFC's first three attempts to appeal, that the issues sought to be presented on this appeal do not involve 'a controlling question of law as to which there is **substantial** ground for difference of opinion ... **an immediate [resolution of which] may materially advance the ultimate termination of the litigation**.' 28 U.S.C. § 1292(b) (emphasis added [by district court]). The Court once again finds no error sufficient to constitute a finding that Bankruptcy Judge Mahoney has abused her discretion in the matters at hand and cannot conclude that the rulings at issue could escape effective review on appeal after a final judgment.

(Chrysler's Appendix at 15).

On November 19, 2002, the court of appeals released its opinion in Case No. 01-90036-D, concluding that there is no statutory authority under 28 U.S.C. §§ 1292(e) & 2072 for the incorporation of Rule 23(f) of the Federal Rules of Civil Procedure, which allows discretionary appeals to the circuit court of orders granting or denying class certification, into the Bankruptcy Rules. The conclusion was based both on the court's construction of the rule-making jurisdiction conferred by 28 U.S.C. § 1292(e) and

its recognition that application of Rule 23(f) to bankruptcy proceedings would create simultaneous and conflicting interlocutory appellate jurisdiction in the court of appeals under Rule 23(f) and the district court under 28 U.S.C. § 158(a). Because of its disposition of the Petition on jurisdictional grounds, the court of appeals did not reach "the timeliness or mootness issues of Chrysler Financial Corporation's petition," the issue of how Rule 23(f) would be read and implemented under Bankruptcy Rule 9002 if Rule 23(f) were to be held properly incorporated into the Bankruptcy Rules, or the issue whether the established criteria for the allowance of a discretionary appeal under Rule 23(f) as described in *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266 (11th Cir. 2000) could have been demonstrated by Chrysler in any event. 312 F.3d 1241 (11th Cir. 2002) (Chrysler Appendix at 1-11).

On January 10, 2003, the court of appeals dismissed the second Chrysler 23(f) Petition (No. 02-90035) for lack of jurisdiction on the authority of its November 19, 2002 ruling.

Although not integral to the status of this case, Chrysler's Petition contains material misstatements of fact relating to the status of the five parallel class action adversary proceedings filed in the Southern District of Alabama. At page 23 of the Petition, Chrysler states: "Of the six adversary proceedings in the Southern District of Alabama from which similar Rule 23(f) petitions were filed in the court of appeals, only this one survives. All the rest have settled or had final judgment entered."

Rule 23(f) petitions were filed in four cases, not six. In addition to the Chrysler petitions, a Rule 23(f) petition was filed in *First Union Mortgage Corporation v. Dean*

(Case No. 01-90039-B), which was disposed of by the Eleventh Circuit's November 19, 2002 ruling. The *First Union* case is currently on appeal to the district court from a judgment entered in favor of the plaintiff class against First Union Mortgage Corporation.

A Rule 23(f) petition was filed in *Smith v. PNC Mortgage Corp. of America* (Case No. 01-90060-C), which was disposed of by the Eleventh Circuit's November 19, 2002 ruling. A settlement was subsequently reached, and a motion for approval of the settlement is currently pending.

Two Rule 23(f) petitions were filed in *Noletto v. Nationsbanc Mortgage Corp.* (Case Nos. 01-90035 and 01-90045) but terms of settlement were reached prior to consideration of the petitions, and the petitions were withdrawn. A class settlement has been finally approved by the bankruptcy and district courts in the case.

Rule 23(f) petitions were never filed in *Sheffield v. Homeside Lending, Inc.*, Adversary No. 99-1124, or *Slick v. Norwest Mortgage, Inc.*, Adversary No. 99-1136. Terms of settlement were reached in *Sheffield* on the morning of trial and in *Slick* after trial and entry of judgment against the defendant. Class settlements have been finally approved by the bankruptcy and district courts in both cases.

REASONS FOR DENYING THE WRIT

I. The Petition Does Not Present An Important Question Of Federal Law

A. The Petition Has Been Filed For The Purpose Of Further Delaying And Obstructing The Resolution Of This Case

The underlying adversary proceeding here was filed almost four years ago. Chrysler immediately sought to have the case removed from the bankruptcy court with a withdrawal of reference motion, which was denied by the district court. Chrysler subsequently filed four (4) separate motions for permission to take interlocutory appeals to the district court pursuant to 28 U.S.C. § 158(a), each and every one of which having been emphatically denied by the district court. Simultaneously with the filing of its last two § 158(a) motions with the district court, Chrysler also filed petitions with the Court of Appeals for the Eleventh Circuit seeking interlocutory review of the same bankruptcy court orders under Fed. R. Civ. P. 23(f) and Bankruptcy Rule 7023. From the determination of the court of appeals that Rule 23(f) has not been incorporated into the Bankruptcy Rules, Chrysler has filed the present petition for certiorari. Rather than addressing and resolving the sole factual issue that stands between Chrysler and a decision of the bankruptcy court fully in its favor on the merits, "[t]he trial of [which issue] will not take much time and [as to which] the [bankruptcy] court is prepared to hold the trial as soon as the parties can be ready," Chrysler continues its efforts to multiply proceedings and frustrate final resolution in the bankruptcy court. Chrysler's tactical approach to this litigation continues to demonstrate the very reasons why interlocutory appeals are discouraged.

> We reiterate, however, that interlocutory appeals are inherently "disruptive, time-consuming, and expensive," [citation omitted] and consequently are generally disfavored. Piecemeal appellate review has a deleterious effect on judicial administration. It increases the workload of the appellate courts, to the detriment of litigants and judges. It requires the appellate courts to consider issues that may be rendered moot if the appealing party ultimately prevails in or settles the case. It undermines the district court's ability to manage the action. And it creates opportunities for abuse by litigants seeking to delay resolution of a case by raising with the appellate court objections to the scope of an order that should have been raised first with the district court itself. Most of these concerns are, if anything, even more compelling in the class action context, especially given the district court's broad authority under Rule 23(c)(1) to monitor and if necessary reconsider its class certification decision as discovery unfolds and the action progresses to trial.
>
> We will therefore use restraint in accepting Rule 23(f) petitions, and these interlocutory petitions will not be accepted as a matter of course.

Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1276-77 (11th Cir. 2000).

B. In This Case Rule 23(f) Would Provide At Most A Means Of Seeking Interlocutory Review, Not A Means Of Obtaining Interlocutory Review

Rule 23(f) does not confer a right to interlocutory review as intimated by Chrysler; rather, it at most provides an opportunity to request interlocutory review, the

grant of which is entirely discretionary with the court of appeals. As noted above, Rule 23(f) petitions are viewed with skepticism by the Eleventh Circuit and application of the criteria applied by the Eleventh Circuit in considering Rule 23(f) virtually assures that Chrysler's Petitions, even if they were not moot, would be denied by the Eleventh Circuit. In formulating "guideposts" for the exercise of its "discretion" to hear interlocutory appeals of district court class issue orders under Rule 23(f), the Eleventh Circuit has identified and discussed five areas of inquiry:

> **First, and most important, the court should examine whether the district court's ruling is likely dispositive of the litigation by creating a "death knell" for either plaintiff or defendant.** The prospect of irreparable harm from delaying appellate review of the class certification decision until after final judgment undoubtedly creates a compelling need for immediate review. Nevertheless, even ordinary class certification decisions by their very nature may radically reshape a lawsuit and significantly alter the risk-benefit calculation of the parties, leading to claims of irreparable harm. **For that reason, the decision to grant interlocutory review based primarily on this factor generally should be limited to those cases where the district court's ruling, as a practical matter, effectively prevents the petitioner from pursuing the litigation. This might be the case where a denial of class status means that the stakes are too low for the named plaintiffs to continue the matter, or where the grant of class status raises the cost and stakes of the litigation so substantially that a rational defendant would feel irresistible pressure to settle. . . . We anticipate**

> **that the number of decisions truly warranting immediate review on this basis alone will be small.**

Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1274 (11th Cir. 2000) (emphasis added).

It would be impossible for Chrysler to contend at this stage of the litigation that the denial of interlocutory review would be the death knell for its contest of this case.

> **Second, a court should consider whether the petitioner has shown a *substantial* weakness in the class certification decision, such that the decision likely constitutes an abuse of discretion.** Ordinarily, the appropriateness of allowing a rule 23(f) appeal should turn on more than the outcome of a preliminary debate about the merits of the district court's ruling. Interlocutory review may be appropriate when it promises to spare the parties and the district court the expense and burden of litigating the matter to final judgment only to have it inevitably reversed by this Court on an appeal after final judgment. . . . **Typically, however, class certification decisions require the application of broad and flexible legal standards to unique and complex sets of facts that do not fit squarely within prior precedent. Due to the highly fact-sensitive nature of this inquiry, district courts are given wide latitude to decide whether and how to certify a class, and appellate scrutiny of such decisions is limited at any stage. Accordingly, merely demonstrating that the district court's ruling is questionable generally will be insufficient to support a Rule 23(f) petition in the absence of other factors**

> **supporting immediate review. *See Armstrong*, 138 F.3d at 1386 ("class certification decisions are left to the sound discretion of the district court, and in most cases the certification order can be effectively reviewed on appeal after final judgment.")**

Id. at 1274-75 (italics in original; emphasis added).

> Third, a court should consider whether the appeal will permit the resolution of an unsettled legal issue that is "important to the particular litigation as well as important in itself." *Mowbray*, 208 F.3d at 294. . . . **We reiterate, however, that a class certification decision which "turns on case-specific matters of fact and district court discretion," Comm. Note, Fed.R.Civ.P. 23 – as most certification decisions indisputably do – generally will not be appropriate for interlocutory review.**

Id. at 1275 (emphasis added).

> Fourth, a court should consider the nature and status of the litigation before the district court. Some cases plainly will be in a better pretrial posture for interlocutory appellate review than others. As noted above, the propriety of granting or denying a class, as well as the proper scope of any class that has been granted, may change significantly as new facts are uncovered through discovery. **Similarly, a limited or insufficient record may adversely affect the appellate court's ability to evaluate fully and fairly the class certification decision. Moreover, a district court's ruling on dispositive motions or a motion to add new class representatives, parties, or claims may significantly redefine the issues in the case**

> **and thereby affect the scope of or need for a class. Accordingly, the decision on a Rule 23(f) petition may take into account such considerations as the status of discovery, the pendency of relevant motions, and the length of time the matter already has been pending.**

Id. at 1276 (emphasis added).

> **Finally, a court should consider the likelihood that future events may make immediate appellate review more or less appropriate. Simply by way of example, settlement negotiations involving some or all of the parties affected by the decision, or the prospect of an imminent change in the financial status of a party (such as a bankruptcy filing) may caution against hearing an interlocutory appeal.** Conversely, if the case is likely to be one of a series of related actions raising substantially the same issues and involving substantially the same parties, then early resolution of a dispute about the propriety of certifying a class may facilitate the disposition of future claims. **Also significant is whether the district court itself has indicated that it views its class certification decision as conditional or subject to revision at a later stage in the case.**

Id. (emphasis added).

Chrysler's suggestion that the Eleventh Circuit would be eager to address the issue whether "a bankruptcy judge [may] certify a class that includes debtors whose bankruptcy cases are or were filed in other districts" (Petition at 9) is particularly unpersuasive given the fact that the

Eleventh Circuit has already declined the opportunity to address this very issue on an interlocutory basis. In *Bank United v. Manley*, 273 B.R. 229 (N.D. Ala. 2001), a decision cited by Chrysler, the district court, in a comprehensive opinion, specifically affirmed a bankruptcy court's determination that it had jurisdiction to certify a nationwide class of debtors in an appropriate case. At the request of the affected defendants, the district court in *Manley* certified the issue for immediate appeal under 28 U.S.C. § 1292(b). The Eleventh Circuit denied the request for interlocutory appeal in *Manley*. (Case No. 01-90059-I) (Respondents' Appendix at 5-6).

C. Chrysler's Petition In Case No. 01-90036-D Is Moot And Chrysler's Petition In Case No. 02-90035 Will Be Moot Before Chrysler's Petition To This Court Would Be Heard

As noted above, Chrysler's petition for interlocutory appeal to the court of appeals in Case No. 01-90036-D related to the July 27, 2001 Class Issues Order entered by the bankruptcy court. Subsequent to the entry of that Order, trial on the merits occurred in the bankruptcy court in December, 2001, and the July 27, 2001 Class Issues Order was modified and superseded first by the May 10, 2002 Order Granting Judgment To Chrysler Financial Corporation and then by (a) the July 3, 2002 Order Granting In Part Plaintiffs' Motion To Alter Or Amend the Court's Order of May 10, (b) the August 23, 2002 Order Denying Motion For Reconsideration And Amendment Of The Court's Order of July 3, 2002, and (c) the August 23, 2002 Order Denying Chrysler's Motion To Determine That Named Plaintiffs Have No Standing To Be Class Representatives And To Dismiss All Further Class Proceedings.

Chrysler is requesting that this Court grant certiorari and ultimately direct that the court of appeals should now exercise jurisdiction to determine on a discretionary basis whether it should entertain an interlocutory appeal as to a class certification order that has been superseded and modified after trial on the merits by four subsequent orders of the trial court. The Petition in Case No. 01-90036-D is now moot, and Chrysler is requesting the Court to exercise certiorari jurisdiction to render a purely advisory opinion as to that Petition.

Chrysler's Petition in Case No. 02-90035 related to the bankruptcy court's August 23, 2002 Order Denying Motion For Reconsideration And Amendment Of The Court's Order of July 3, 2002, and to the bankruptcy court's August 23, 2002 Order Denying Chrysler's Motion To Determine That Named Plaintiffs Have No Standing To Be Class Representatives And To Dismiss All Further Class Proceedings. Those orders make it clear that there is only a single open evidentiary issue remaining in the case before the bankruptcy court. The bankruptcy court noted in its September 3, 2002 Order that "[t]he trial of this matter will not take much time and the court is prepared to hold the trial as soon as the parties can be ready." The sole delaying factor has been Chrysler's continuing resistance to discovery. If the Court were to grant certiorari and schedule the matter for consideration as to the Petition in Case No. 02-90035, the trial of the last remaining issue will have been concluded in the bankruptcy court and the case will almost certainly be on appeal to the district court long before this Court will have had time to reach a decision. Inevitably, any decision rendered with respect to Case No. 02-90035 would also be only an advisory opinion by the time the decision is reached.

II. The Court of Appeals' Decision Is Not Erroneous.

In response to the jurisdictional issue raised sua sponte by the court of appeals, the plaintiffs advanced the position that Rule 23(f) did not confer a basis for interlocutory review of class certification orders entered by bankruptcy judges under either an analysis of the rule-making jurisdiction conferred by statute or under an analysis of the implementation of rule language if jurisdiction were to be found. The court of appeals reached only the statutory analysis, concluding that "there is no statutory authority under §§ 1292(e) and 2072 for the incorporation of Rule 23(f) into the Bankruptcy Rules." For the reasons set out at length in the court of appeals' opinion, this conclusion is correct.

Moreover, even if Rule 23(f) were found to have been effectively incorporated into the Bankruptcy Rules, the implementation of the language of the Rule as directed by Bankruptcy Rule 9002 would separately result in the conclusion that no petition to the court of appeals could be brought. The court of appeals in footnote 3 to its opinion sketches the resulting language if Rule 23(f) were read as incorporated into Bankruptcy Rule 7023 in the manner directed by Bankruptcy Rule 9002. By operation of Rule 9002(2), the word "appeal" appearing in the Federal Rules of Civil Procedure made applicable by operation of the Bankruptcy Rules is to be read as "an appeal as provided by 28 U.S.C. § 158," which expressly contemplates interlocutory appeals from the bankruptcy court only to the district court. In order to create a field of operation for Rule 23(f) if it were to be engrafted on Bankruptcy Rule 7023, the court of appeals would have to determine that the definition specified to be used in Bankruptcy Rule 9002(2) should be ignored as "inconsistent with the context" and

would have to fashion a different meaning out of whole cloth. The effect of such a rewriting of the Bankruptcy Rule would be to create a duplication through Rule 23(f) of "an appellate avenue . . . already available to petitioners through an interlocutory appeal to the district court."

The most compelling observation underscoring the correctness of the court of appeals' opinion is its "real world" analysis of the result if both Rule 23(f) and 28 U.S.C. § 158(a) were found to be simultaneously available as separate avenues for seeking interlocutory review of a class order entered by a bankruptcy judge.

> Furthermore, if Rule 23(f) were applied to class certification orders in bankruptcy, litigants could appeal such orders simultaneously to the district court pursuant to 28 U.S.C. § 158(a) and to the court of appeals pursuant to Bankruptcy Rule 7023(f). That scenario, needless to say, is fraught with uncertainty.[7]
>
> > [7] For instance, there would be confusion regarding the status of the district court's jurisdiction over an appeal of a bankruptcy judge's class certification order if and when the court of appeals exercises Rule 7023(f) jurisdiction, and, if the district court retains such jurisdiction, the risk of inconsistent determinations.
>
> Therefore, we also find practical value in recognizing that §§ 1292(e) and 2072 do not permit incorporation of Rule 23(f) into the Bankruptcy Rules.

312 F.3d at 1246 (Chrysler Appendix at 10).

Chrysler's Petition contains the remarkable assertion that "the risk of simultaneous appeals of the same order under both § 158(a) and Rule 23(f) is more theoretical than real." (Petition at 20-21). Given the fact that **Chrysler has already filed simultaneous motions for permissive appeal under both §158(a) and Rule 23(f) not once, but twice, in this case**, one must assume that Chrysler is drawing a distinction between simultaneous motions for permission to appeal and simultaneous appeals themselves. The reality proven by Chrysler's own tactics is that a litigant bent on disrupting the orderly process of the case can be counted on to file duplicative motions for interlocutory appeal with every court that will accept them. The further prospect is that adversary parties who were both dissatisfied with a bankruptcy judge's ruling on class issues for different reasons might each file a motion for permissive appeal of the ruling to whichever court it felt was more likely to favor its petition. Chrysler's simplistic faith in the ability of district and circuit courts to spontaneously fashion a "first in time, first in right" rule of deference between themselves is equally remarkable: "One court can simply deny review if another court has granted it." (Petition at 21). Chrysler does not explain how one court is to remain continuously apprised of what the other court has done, or refused to do, with respect to a motion for permissive appeal while deciding what it itself desires to do with a parallel motion dealing with the identical bankruptcy court ruling. More to the point of its argument, Chrysler does not explain why the purportedly intentional creation of a "needed means of appellate review" at the court of appeals level "to permit the early development of binding precedent on . . . fundamental issues," "to bring order and binding precedent to the increasingly active field of class action litigation in

bankruptcy" would itself contemplate preemption of consideration of a motion by the court of appeals due to the grant of a § 158(a) motion by the district court, before the court of appeals could act on the parallel Rule 23(f) motion before it.

In creating the appellate structure of the bankruptcy system, Congress took great pains in enacting 28 U.S.C. § 158(d) to limit the appellate jurisdiction of the courts of appeal to "final decisions, judgments, orders, and decrees" of district courts and bankruptcy appellate panels only. With 28 U.S.C. § 158(a), Congress vested interlocutory appellate jurisdiction exclusively in the district courts to hear appeals "with leave of the court, from other interlocutory orders and decrees of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of [title 28]." In 1992, Congress amended section 1292 of title 28, which deals generally with the jurisdiction of courts of appeals over interlocutory appeals from district court orders by adding subsection (e) to authorize the Supreme Court to "prescribe rules in accordance with section 2072 of [title 28]" providing for "an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" under the rest of § 1292. By enacting §1292(e), Congress did not repeal § 158(d) or delete the jurisdiction over interlocutory appeals from bankruptcy orders previously vested in district courts under § 158(a). The limiting reference to "rules in accordance with section 2072" is a clear indication that Congress did not intend to confer on the Supreme Court the power to amend § 158 by rulemaking. As noted by the court of appeals, "[a]s § 2072 grants the Supreme Court substantive powers to prescribe rules for district courts and courts of appeals, its constraint upon authorizing the

prescription of rules for interlocutory appeals under § 1292(e) must be read to apply to the same extent or mean nothing at all." 312 F.3d at 1244 (Chrysler Appendix at 7). The limiting reference to "rules in accordance with section 2072" is particularly understandable in the context of the inapplicability of Rule 23(f) interlocutory appeals here because, in the words of the court of appeals, "the appellate avenue addressed by Rule 23(f) is already available to petitioners through an interlocutory appeal to the district court." *Id.* at 1246 (Chrysler Appendix at 9).

III. CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 24, 2003

APPENDIX

United States District Court,
S.D. Alabama
Southern Division.

In re: Michael F. POWE, Debtor,
Michael F. POWE, Plaintiff,
v.
CHRYSLER FINANCIAL CORPORATION, Defendant.

No. CIV. A. 00-0283-BH-L.

May 1, 2000.

Steve Olen, Esq., Olen, Nicholas & Copeland P.C., Mobile.
C. Lee Reeves, Esq., Sirote & Permutt, P.C., Birmingham.
Michael Edwin Gabel, Esq., Sirote & Permutt, P.C., Mobile.

ORDER

HAND, Senior District J.

Chrysler Financial Corporation (CFC) now seeks leave to appeal an interlocutory Order entered by the Bankruptcy Court on February 15, 2000, denying CFC's motion, as well as the comparable motions to dismiss filed by the defendants in five similar class action adversary proceedings, to dismiss the debtor's/plaintiff's class claims for lack of jurisdiction and declaring that this Court and the Bankruptcy Court have subject matter jurisdiction over the class claims. All issues relating to the propriety of certification of a class other than subject matter jurisdiction were, under the February 15 Order, carried forward "for further consideration at a later date to be set by the Court." CFC asks this Court to review the interlocutory February 15 Order under 28 U.S.C. S 158(a)(3), which it contends is a "more relaxed and liberal application of the

standard under 28 U.C.S. S 1292(b)." CFC's Reply Brief (Doc. 3) at 7.

Upon consideration of CFC's motion, plaintiff's brief in opposition thereto (Bankr.Doc. 32), CFC's Reply (Doc. 3) and all other pertinent portions of this record, the Court concludes, for the reasons stated in both the subject Order of February 15 and plaintiff's brief in opposition, that the motion for leave to appeal is due to be denied. The Court specifically agrees that the issues presented on this appeal, absent any certification of a class or definition of the scope of the class, do not involve "a controlling question of law as to which there is substantial ground for difference of opinion ... an immediate [resolution of which] may materially advance the ultimate termination of the litigation." 28 U.S.C. S 1292(b). The Court also concludes, despite CFC's contentions to the contrary, that "[t]he standards for granting leave from an interlocutory order of the bankruptcy court are guided by [§ 1292(b)] the statute governing interlocutory appeals from the district court to the circuit court." See e.g., In re MCorp Financial, Inc., 139 B.R. 820, 823 (S.D.Tax.1992). Even under the "more relaxed" standards of Rule 23(f) and 28 U.S.C. § 158(a) asserted by CFC, however, the Court believes that CFC's request for leave to appeal is inappropriate and due to be denied.

It is therefore ORDERED that the motion for leave to appeal be and is hereby DENIED and that this action be returned to the Bankruptcy Court forthwith.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re
MICHAEL F. POWE
Debtor.

Case No.
98-10935-MAM-13

MICHAEL F. POWE, et al.,
Plaintiff,

v.

Adv. No. 99-1121

CHRYSLER FINANCIAL CORPORATION
Defendant.

ORDER DENYING MOTION FOR LEAVE TO APPEAL AND MOTION FOR STAY

This case is before the Court on the motion of Chrysler Financial Corporation for leave to appeal and for a stay pending appeal. This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Court has the authority to enter a final order. If it is not a core proceeding the Court reports and recommends to the District Court that it deny this motion pursuant to Fed. R. Bankr. P. 9033. The Court is denying the motion.

This case has been pending for three years. Other motions for leave to appeal and for stays pending appeal have been filed and been denied. This Court has concluded that the case needs to be tried and completed. Chrysler asserts that the Court's ruling was incorrect. What Chrysler does not point out is that the case would have been completed and finally decided with all issues

taken into account if the Court had been clear about the documents produced by Chrysler that the plaintiff class offered as evidence. If the proofs of claim contain completely undisclosed postpetition attorneys fees, then the class should be awarded injunctive relief. The fees should be expunged from class members accounts and refunds given. If the proofs of claim include fees that were disclosed in the proof or otherwise, then the class will be denied relief. This opinion is consistent with the rulings by the court in this and other cases to date. *Slick v. Norwest Mortgage, Inc.* (*In re Slick*), Ordering Awarding Judgment to the Plaintiffs, Case No. 98-14378-MAM-13, Adv. No. 99-1136 (Bankr. S.D. Ala. June 24, 2002); *Harris v. First Union Mortgage Corp* (*In re Harris*), Order Awarding Judgment to the Plaintiffs, Case No. 96-14029, Adv. No. 99-1144 (Bankr. S.D. Ala. June 24, 2002). This issue is on appeal in at least one other case already. The trial of this matter will not take much time and the court is prepared to hold the trial as soon as the parties can be ready. There are only a limited number of law firms, if any, that may have charged fees that were completely undisclosed.

For the reasons indicated above, the Court concludes that the motions should be denied.

IT IS ORDERED that the motion of Chrysler Financial Corporation, defendant, is DENIED.

Dated: September 3, 2002

/s/ Margaret A. Mahoney
MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-90056-I

COUNTRYWIDE HOME LOANS, INC.,

Petitioner,

versus

MARY E. MORROW,

Respondent.

No. 01-90057-I

FLEET MORTGAGE GROUP, INC.,

Petitioner,

versus

JOHNNY T. LITTLE,

Respondent.

No. 01-90058-I

GE CAPITAL MORTGAGE SERVICES, INC.,

Petitioner,

versus

WILBURN B. AND CLARSIE M. HAGER,

Respondents.

No. 01-90059-I

BANK UNITED,

Petitioner,

versus

JESSIE M. MANLEY,

Respondent.

On Petition for Permission to Appeal from the
United States District Court for the
Northern District of Alabama

BEFORE: ANDERSON, Chief Judge, BLACK and MARCUS, Circuit Judges.

BY THE COURT:

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is **DENIED**.